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TAGS: [KDEM](#) [PGOV](#) [KE](#)
SUBJECT: SENATOR FEINGOLD TOLD OF CHALLENGES TO KENYA'S
ELECTORAL PROCESS AND HUMAN RIGHTS RECORD

REF: A. NAIROBI 3973
[1](#)B. NAIROBI 3679

[1](#)1. (SBU) Summary and Comment: Top electoral and human rights officials confided to Senator Feingold the numerous challenges facing the independence of their institutions. The Electoral Commission of Kenya highlighted the limitations on their ability to penalize electoral malpractices, while the Kenyan National Commission on Human Rights cited politically motivated corruption charges and control over their finances as government tools to silence its critics. The Senator's diplomatic show of support to both of these beleaguered institutions gives a much needed boost to their efforts to promote human rights, including a free and transparent electoral process. End Summary and Comment.

[1](#)2. (U) Senator Russell Feingold, staffer Grey Frandsen, Polcouns, and Poloff visited the headquarters of the Electoral Commission of Kenya (ECK) on November 28 and met with top electoral officials at a time when the credibility and independence of the institution is under threat. ECK Chairman Samuel Kivuitu, joined by three other commissioners, highlighted the difficulties facing the institution regarding the upcoming national elections, anticipated to be held late [1](#)2007. Senator Feingold applauded the ECK's successful management of the 2002 general elections.

Electoral Shenanigans Difficult to Discourage

[1](#)3. (SBU) When asked by Senator Feingold about what the Commission is doing to respond to allegations of misconduct during the July by-elections, including misuse of government resources and flat-out bribery by politicians and their supporters (ref A), ECK chairman Kivuitu said that the ECK was very concerned about the allegations and had received three separate reports documenting allegations of irregularities. He said he even received a call the day of the polling from a distraught ECK commissioner who had witnessed first hand misconduct by senior political leaders in broad daylight. However, he complained that the ability of the ECK to take action to redress electoral malpractices is severely constrained. Kivuitu lamented that the ECK's hands were tied to impose serious consequences for misconduct such as to nullify or delay election results. While in theory, the ECK could take such action, in practice it is nearly impossible under current regulations. According to Kivuitu, to delay or nullify the results, the ECK must

present concrete evidence of the wrongdoing to a High Court, which may be several hours drive from the location of the alleged electoral malpractices, before the close of the polls -quite a Herculean feat under even the most favorable of circumstances. At best, the tools available to the ECK allow them to reprimand and/or fine wrong-doers. Kivuitu stated that he and other commissioners have been agitating for change to these provisions, but was pessimistic about achieving the changes through law due to the paralyzing effect of political wrangling on law-making in Parliament.

¶4. (SBU) Kivuitu explained that the allegations contained in the three reports are being extensively reviewed and analyzed by the committee on the electoral code of conduct. Kivuitu suggested that the ECK's response in this instance might be to call a press conference and name and shame the culpable parties, to drive home the point that misuse of state resources and illegal inducements to voters is wrong and will not be tolerated. (Note: Kivuitu did not suggest fines as an option in this case, perhaps acknowledging the significant obstacles to taking tougher action posed by certain members of the ECK who are allied with the political parties accused of the misconduct. End Note.)

¶5. (SBU) The ECK's limited ability to impose penalties for electoral violations is compounded by the composition of the Commission. Currently, commissioners are appointed to represent political interests, i.e., government or opposition, and these loyalties undermine the independence of the commission and its ability to take disciplinary action, according to Kivuitu. The ECK Chairman stressed that it is of paramount importance that the Commission be perceived by all Kenyans to be objective. Kivuitu stated that the credibility of the institution would be adversely affected if

proposed changes (including changes to the composition of the ECK in the Elections Bill currently before Parliament) to the ECK were adopted so close to the general election.

Critical Human Rights Body
Defiant Despite "Corruption Whip"

¶6. (SBU) Senator Feingold followed his visit to the ECK with a call on the headquarters of the beleaguered Kenya National Commission on Human Rights (KNCHR). The Chairman of KNCHR, Maina Kiai, expressed his appreciation for the Senator's visit and the continued support of the U.S. Embassy. The KNCHR, and Kiai in particular, has been very outspoken in its criticism of the government on human rights, corruption, and even the misuse of state resources in political campaigns. (Note: the KNCHR's report on electoral abuses during the July by-election is among the reports currently being reviewed by the ECK. End Note.) Kiai, who has been the victim of allegations of corruption, widely believed as a result of his outspokenness (ref B), accused the government of brandishing the "corruption whip". He explained that under the previous regime, accusing opponents with "sedition" was a favored tool to silence critics. He said that the current administration has replaced "sedition" with "corruption", with the intent of having equal effect in silencing the government's perceived opponents.

¶7. (SBU) The KNCHR Chairman explained that the current funding structure also poses a direct threat to the KNCHR's independence. Unlike the Kenya Anti-Corruption Commission, which is funded directly from the Treasury, the KNCHR receives its funds through the Ministry of Justice and Constitutional Affairs. Kiai stressed the inherent conflict of interests in bestowing the power of the purse to an institution over which the KNCHR has a mandate to exercise a watchdog function.

U.S. Support for Balancing Human
Rights and the Counter-Terrorism Agenda

¶8. (SBU) Senator Feingold expressed his support for the

efforts of the KNCHR to ensure that provisions of the proposed Anti-Terrorism legislation adequately balances the protection of human rights and national security concerns. Feingold's explanation of his objections to the U.S. Patriot Act were well received by the human rights audience and his emphasis that while counter-terrorism and security are top U.S. priorities, the safeguarding of human rights is essential. This message that enhanced security and the protection of human rights are not necessarily mutually exclusive is a timely and welcomed addition to the public debate in Kenya over the controversial Anti-Terrorism legislation.

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